

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0534**

State of Minnesota,
Respondent,

vs.

Saliou Kouyate,
Appellant.

**Filed June 26, 2023
Reversed and remanded
Bryan, Judge**

Anoka County District Court
File No. 02-CR-20-1187

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brad Johnson, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney,
Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

Appellant challenges the denial of his postconviction petition, arguing that he was entitled to a new plea-withdrawal hearing under the fair and just standard with conflict-free counsel. We agree with appellant that his plea counsel had a conflict of interest at the time

appellant made a presentence request to withdraw his guilty plea. We reverse the denial of his postconviction petition and remand for a new plea-withdrawal hearing with conflict-free counsel.

FACTS

On July 29, 2020, appellant Saliou Kouyate pleaded guilty to third-degree criminal sexual conduct in violation of Minnesota Statutes section 609.344, subdivision 1(d) (Supp. 2019). Kouyate signed a plea petition and reviewed it on the record with counsel. He also, under oath, provided a factual basis for the plea. The district court accepted the plea and immediately ordered Kouyate's release pending a sentencing hearing, which was eventually scheduled for November 13, 2020. On that date, Kouyate requested a continuance of his sentencing hearing so that he could obtain new counsel and seek withdrawal of his plea. Kouyate's counsel explained to the district court that she could not fully advocate for plea-withdrawal. Counsel did indicate that she could advance Kouyate's request "in certain ways," but counsel explained that Kouyate "does not want me to file that motion." Counsel stated that she thought Kouyate "would like to argue some things further than what I thought had merits." At one point, the district court stated that "Kouyate is saying that he was forced into pleading and he wants to withdraw his plea." The district court also stated that "Kouyate wanted to fire [counsel] and withdraw his plea." The district court granted the continuance to allow Kouyate time to retain substitute counsel.

In a January 2021 letter to the court, Kouyate's counsel requested another continuance of the sentencing hearing because Kouyate was still gathering "the funds to pay for a private attorney." On this same day, counsel also filed a motion on Kouyate's

behalf requesting to withdraw his plea. In this motion, counsel noted that Kouyate requested to withdraw his plea “because he is innocent” and his attorney told him that if he did not plead guilty, he was “going to prison.”

At the subsequent sentencing hearing on January 25, 2022,¹ Kouyate had not yet obtained substitute counsel, so his original plea counsel continued to represent him. At the outset of the hearing, Kouyate’s counsel noted that Kouyate wanted to withdraw his guilty plea, but counsel explained that, in her opinion, the plea was valid:

[T]his is his motion, I think when we entered the plea he made a knowing and voluntary waiver of his rights when he entered his plea. We went through a very thorough waiver on the record, as the Court may have recalled. So, again, this is his motion. I don’t know what else he’ll want to let the Court know about that.

Kouyate also personally addressed the court. Kouyate stated that he “wasn’t really willing to enter no plea deal or anything . . . [he] didn’t want to do it, that [he] wanted to go through with the trial and see the end of it.” Kouyate explained, “I know that I’m innocent . . . [b]ut it looked like to me that my attorney didn’t really look like she wanted to fight for me anymore.” The district court denied the plea-withdrawal motion, observing that “the prejudice to the State is extreme at this point,” and that there was “a complete and total waiver here.” The district court proceeded to sentencing and denied Kouyate’s motion for a downward dispositional departure. The district court sentenced Kouyate to 41 months in prison followed by a ten-year term of conditional release. Kouyate appealed his conviction.

¹ The district court rescheduled the sentencing hearing to February 9, 2021, but Kouyate did not appear on that date, and a warrant was issued for his arrest. Kouyate was apprehended in January 2022 and appeared in custody at the January 25, 2022 hearing.

Kouyate requested a stay of his direct appeal in order to petition for postconviction relief. This court granted the stay. In his petition for postconviction relief, Kouyate requested an evidentiary hearing to substantiate the claims raised in the petition—including the claims that the guilty plea was not voluntary or intelligent. Kouyate also argued that in the alternative, the district court should grant him a new plea-withdrawal hearing, under the fair and just standard, because his counsel had a conflict at the time of the November 13, 2020 and January 25, 2022 hearings when Kouyate requested to withdraw his plea. The postconviction court denied his petition without an evidentiary hearing based on its determination that there were no disputed issues of fact to justify an evidentiary hearing regarding the voluntariness and intelligence of the plea. In addition, the postconviction court rejected Kouyate’s argument that his counsel had a conflict of interest: “[N]o conflict of interest existed that prohibited [Kouyate’s] trial attorney from adequately representing him at the hearing on the motion to withdraw his guilty plea.” Kouyate filed a motion requesting reinstatement of his appeal. This court granted the reinstatement request.

DECISION

Kouyate argues that his counsel’s statements on November 13, 2020, and January 25, 2022, indicate a conflict of interest and that, pursuant to binding authority, this court should remand for a new plea-withdrawal hearing with conflict-free counsel. We agree with Kouyate and conclude that his counsel made comments prior to sentencing which required the district court to determine whether an impermissible conflict existed before addressing the merits of the plea-withdrawal motion. Because the district court did not

make any such determination at that time, we remand to the district court to permit Kouyate to request plea-withdrawal with the assistance of conflict-free counsel.²

The federal and state constitutions guarantee the right to the effective assistance of counsel in criminal proceedings. U.S. Const. amend. VI; Minn. Const. art. I, § 6; *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016). To establish ineffective assistance of counsel, the defendant must show that counsel's performance was objectively unreasonable and that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687-88. This court reviews ineffective assistance of counsel claims involving application of the *Strickland* test de novo. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). The right to effective assistance of counsel includes a "correlative right" to conflict-free counsel, *Wood v. Georgia*, 450 U.S. 261, 271 (1981), and a defendant can establish the deficient performance prong of *Strickland* by demonstrating that counsel had a conflict of interest, *State v. Paige*, 765 N.W.2d 134, 140 (Minn. App. 2009). "A conflict of interest exists if 'there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.'" *Paige*, 765 N.W.2d at 140 (quoting Minn. R. Prof. Conduct 1.7(a)(2)).

² Kouyate alternatively requested postconviction relief regarding the voluntariness and intelligence of the plea, issues that, in this case, may have required development of the record given the factual statements in the petition concerning the circumstances of the plea. Given our decision, however, we need not review these alternative arguments. While we decline to reach the merits of these issues, Kouyate's right to pursue these claims in a subsequent petition for postconviction relief is preserved. *See State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000).

A defendant who raised no objection to counsel's representation must demonstrate that counsel "actively represented conflicting interests" and that the conflict "adversely affected [the] lawyer's performance." *Cooper v. State*, 565 N.W.2d 27, 32 (Minn. App. 1997) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980)), *rev. denied* (Minn. Aug. 5, 1997). When an attorney's statements inform the district court of a probable risk of conflict, however, the district court is required to determine whether a conflict exists. *Id.* If the district court "fails to take adequate steps to ascertain whether an impermissible conflict exists, the defendant's conviction must be reversed without inquiry into prejudice resulting from the alleged conflict." *Id.* (citing *Holloway v. Arkansas*, 435 U.S. 475, 484, 488-89 (1978) and *United States v. Fish*, 34 F.3d 488, 492 (7th Cir.1994)).

This court has held that when a defendant made clear his desire to withdraw a guilty plea and defense counsel did not file the requested motion or make any arguments on his client's behalf in support of this request, the conduct of defense counsel was "sufficient to bring the district court's attention to the fact that a potential conflict of interest existed." *Paige*, 765 N.W.2d at 140-41. In that case, the defendant pleaded guilty to second-degree murder, but prior to sentencing wrote a letter to the court indicating that he wanted to withdraw his plea and fire counsel, stating that he only pleaded guilty because of counsel's "verbal coercion and persuasion." *Id.* at 136-37. Counsel appeared with Paige at sentencing and stated that he was "a little bit in a difficult position in terms of what [he could] and [could not] do in this case" because of Paige's allegations that counsel was ineffective. *Id.* This court determined that counsel's comments were sufficient to bring the district court's attention to the fact that a potential conflict of interest existed and,

pursuant to *Cooper*, required the district court to take adequate steps to determine whether a conflict existed. *Id.* at 141. This court also concluded that the district court did not follow the requirement set forth in *Cooper* and did not provide Paige with substitute counsel. *Id.* As a result, we remanded the case for a new plea-withdrawal hearing with conflict-free counsel. *Id.* at 142.

We conclude that here, as in *Paige*, counsel's statements and conduct here were sufficient to "bring the district court's attention to the fact that a potential conflict of interest existed." 765 N.W.2d at 141. Defense counsel explained that Kouyate wanted to withdraw his plea, but rather than advocate for this request, counsel emphasized disagreement with the request, going so far as to expressly question the merits of the request. At the January 25, 2022 hearing, counsel defended her performance and her belief that the plea was valid. Once counsel did so, the holdings in *Cooper* and *Cuyler* required the district court to take steps to determine whether counsel could continue to effectively represent Kouyate. The district court did not take the required steps, and Kouyate is entitled to a new plea-withdrawal hearing with conflict-free counsel.³

The state argues that the supreme court's holding in *Butala v. State*, 664 N.W.2d 333 (Minn. 2003) compels a different result, but we are not convinced for two reasons. First, *Butala* argued his lawyers provided ineffective assistance through their conduct and advice during plea negotiations, not that his lawyers acted in conflict with his interests

³ Because Kouyate requested withdrawal of his plea prior to sentencing, he is entitled to have his withdrawal motion considered under Minnesota Rule of Criminal Procedure 15.05, subdivision 2 (permitting withdrawal "if it is fair and just to do so").

pursuant to *Cooper* or *Cuyler*. *Butala*, 664 N.W.2d 341-42. Second, and more substantively, defense counsel representing Butala “declined to speak” and “stepped aside.” *Id.* at 337. In contrast, Kouyate’s counsel actively argued against Kouyate’s stated interest, adversely affecting counsel’s ability to advocate for plea withdrawal. For these reasons, we follow *Paige*, *Cooper*, and *Cuyler*. Kouyate was not provided an opportunity to fully litigate his plea-withdrawal claim with the assistance of conflict-free counsel.

As in *Paige*, we reverse the denial of Kouyate’s petition for postconviction relief and remand to the district court for another plea-withdrawal hearing with conflict-free counsel.⁴

Reversed and remanded.

⁴ Given our decision, we need not address Kouyate’s argument that the district erred in denying his dispositional departure motion. Kouyate’s right to pursue this argument should the district court deny his request to withdraw his plea on remand is preserved. *See Gustafson*, 610 N.W.2d at 321. We also note that Kouyate’s conviction remains intact pending the district court’s determination on his plea-withdrawal motion. *See State v. Kaiser*, 469 N.W.2d 316, 320 (Minn. 1991) (reversing this court, reinstating the defendant’s conviction, and remanding for another plea-withdrawal hearing because the district court erred by not letting the defendant testify about his lawyer’s ineffectiveness at the initial plea-withdrawal hearing).